THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-40-4244

Melissa Anne York and
Olga Joanne Cristy,

Appellants,

v.

Dodgeland of Columbia, Inc.
and Jim Hudson Automotive
Group, and Jim Hudson
Superstore, a/k/a Jim Hudson
Hyundai

Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

On June 25, 2010, Melissa Anne York and Olga Joanne Cristy[1] brought this civil action against Appellee Dodgeland of Columbia, Inc. and Respondents Jim Hudson Automotive Group and Jim Hudson Superstore, a/k/a Jim Hudson Hyundai.[2] (Complaint R. pp. 22-32). The complaint was amended on August 5, 2010. (First Amended Complaint R. pp. 33-42). The Consumers alleged the Car Dealers uniformly charged illegal processing fees in the sale of new and used cars, and they set forth three causes of action: (1) misleading and deceptive conduct in violation of S.C. Code Ann. § 56-15-110, *et. seq.*, which includes § 56-15-40, (the "Dealers Act"); (2) Declaratory Judgment to determine rights and legal relations under the Dealers Act and S.C. Code Ann. § 37-2-307 ("Consumer Protection Code"); and (3) Unjust Enrichment. On August 16, 2010, the Consumers served their First Set of Requests for Admission, First Set of Interrogatories, and First Set of Requests for Production. On August 18, 2010, the Consumers served their Second Set of Interrogatories and Second Set of Requests for Production.

On September 3, 2010, Respondent Dodgeland filed a Motion to Dismiss the Complaint and the Action, to Compel Arbitration, to Sever, to Strike, For a More Definite Pleading, For a Protective Order, For Costs and Fees and For Other Relief. (R. pp. 43-57) On September 3, 2010, Respondent Jim Hudson filed a Motion to Dismiss the Complaint

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[1] Ms. York and Ms. Cristy will hereinafter be referred to collectively as "Consumers" or individually as "Appellants."

[2] Dodgeland and Jim Hudson will hereinafter be referred to collectively as "Car Dealers" or individually as "Respondents."

and This Action, To Compel Arbitration, To Sever, To Strike, For a More Definite Pleading, For a Protective Order, For Costs and Fees and For Other Relief (R. pp. 58-73).

On March 7, 2011, the Consumers filed an Omnibus Memorandum in Opposition to All Motions Filed (R. pp. 74-111). On March 8, 2011, the Car Dealers combined to file one Memorandum in Support of Motions to Dismiss, attaching for the first time the contracts upon which their motions to compel arbitration were allegedly based. The motions were heard before the trial court on March 10, 2011. (R. pp. 162-219).

Thereafter, the trial court requested a rehearing of the motions due to their complexity. (R. p. 300). On May 17, 2011, one day before the second hearing was to occur, Respondent Jim Hudson submitted a second arbitration agreement purportedly entered into by Appellant Cristy. (R. pp. 301-305). During the second hearing, counsel for the Car Dealers presented the second arbitration agreement to the trial court, and it was considered, along with the other purported contracts previously submitted by the Car Dealers on March 8, 2011 (R. pp. 255-261, and p. 278). On June 10, 2011, the trial court issued a Form 4 Judgment and attached Order granting the Car Dealers' motions to dismiss and compel arbitration. (R. pp. 3-19).

On June 27, 2011, the Consumers filed a Motion to Reconsider, Alter and Amend Judgment Pursuant to Rule 59(e) and for Rule 60(b) Relief from Judgment (R. pp. 153-157). Respondent Dodgeland filed a Memorandum in Response on July 7, 2011 (R. pp. 158-161). On August 10, 2011, the trial court issued an Order Denying Motion to Reconsider, Alter or Amend. (R. pp. 20-21).

The Consumers timely filed and served their Notice of Appeal on September 12, 2011. On December 22, 2011, this Court issued an Order holding the appeal in abeyance

for sixty days in light of a similar appeal that had been pending before the South Carolina Supreme Court. To explain, the same legal and factual issue in the present case has been prosecuted against different car dealers before the Honorable Doyet A. Early, III, of the Second Judicial Circuit in Aiken, South Carolina in a case styled as Herron, et al. v. Century BMW d/b/a Sonic Automotive, 2006-CP-02-1230. (R. p. 36, ¶ 13). Judge Early denied similar motions to compel arbitration in Herron and the car dealers appealed. The South Carolina Supreme Court accepted certification of the appeal and affirmed in result the trial court's denial of the motion to compel. Herron v. Century BMW, 693 S.E.2d 394 (2010), vacated by Sonic Auto, Inc. v. Watts, 563 U.S. ___, 131 S. Ct. 2872 (2011), reinstated on other grounds by Herron v. Century BMW, No. 26805, 719 S.E. 2d 640 (S.C. Dec. 19, 2011).

STATEMENT OF FACTS

This case arises from the Car Dealers' common scheme to deceptively charge administrative fees, often referred to as an "administrative fee," "recording and processing fee," "closing fee," or "dealer documentation and closing fees" (collectively "administration fees"), in violation of state law. (R. p. 35, ¶ 10). Consumers alleged that the Car Dealers trick customers by negotiating a sales price and then adding in a pre-printed, uniform administrative fee, which is deceptively designed to appear as a fixed cost. (R. p. 35, ¶ 10 and p. 36, ¶ 11). In actuality, it is a line-item for additional profit that is not tied at all to any actual overhead or "closing" costs associated with any particular car buyer's purchase. After negotiation is completed, the Car Dealers present pre-printed administrative fees on dealer invoices or Buyers Orders in a manner that makes the fees appear to be non-negotiable, mandatory fees required to be paid on every

car, similar to taxes, tag, and title. (R. pp. 37-38, ¶ 16, 17, 22). This tactical positioning implies that the illegal administrative fee is mandatory and that consumers have no option but to pay it with every car purchase.

Except for a very narrow and stringent exception, the charging of administrative fees is illegal in South Carolina. (R. p. 38). The Consumer Protection Code, specifically S.C. Code Ann. § 37-2-307, requires that car dealers take certain affirmative steps before charging administrative fees. (Id, ¶ 25-27). Car dealers must, *inter alia,* include the administrative fee in the advertised price; disclose the administrative fee on the sales contract; pay a fee and register annually with the department of consumer affairs; and conspicuously display signs at the dealership disclosing the fact that the dealership charges administrative fees. (Id, ¶ 25-27).

The Consumers alleged that the Car Dealers failed to avail themselves of the limited exception of S.C. Code Ann. § 37-2-307 (Id). The Consumers affirmatively allege that the fees were deceptive and thus violated the Dealer's Act. (R. pp. 35-36, 37, ¶ 8, 9, 10, 11, 32, 33, 34). Additionally, the Consumers alleged that the Car Dealers arbitrarily charged a pre-set fee for every transaction that was intended as a hidden profit, as opposed to offsetting a particular transaction's actual cost. (R. pp. 38-39, ¶ 20, 29).

The Consumers each paid a $289.00 illegal administrative fee to the Car Dealers. (R. p. 37, ¶14, 15). They further alleged that any other person who paid illegal administrative fees to these Car Dealers were similarly harmed. (R. p. 34, ¶ 3). Therefore, the Consumers brought their action individually and pursuant to S.C. Code

Ann. § 56-5-110 for the benefit of all others who paid "administrative fees" to these Car Dealers.[3]

STANDARD OF REVIEW

The trial court granted a motion to dismiss on the pleadings, without discovery. "A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court . . . The motion will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. . . . The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." Williams v. Condon, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001) (internal quotations and citations omitted). This matter was decided at the lower court without any evidentiary record, and as such, presents a purely legal conclusion to which this Court owes no deference.

"An appellate court may decide questions of law with no particular deference to the trial court." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010).

ARGUMENT

I. BECAUSE THE FACTS OF EACH INDIVIDUAL CASE MUST BE EXAMINED TO DECIDE THE ARBITRATION ISSUE, THE CONSUMERS WERE ENTITLED TO ARBITRATION-RELATED DISCOVERY.

[3] S.C. Code Ann. § 56-15-110(2) provides: "When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief."

The Car Dealers' motions to dismiss included a motion for a protective order in light of the Car Dealers refusal to engage in any pre-hearing discovery. (R. p. 54, ¶ 16, pp. 68-69, ¶ 17, p. 58, ¶ 17). The motions were decided without an answer being filed by the Car Dealers. The trial court not only considered materials outside the scope of the pleadings (the purported arbitration agreements) on motions on the pleadings, thereby converting Defendants' motions into motions for summary judgment pursuant to Rule 12(c), SCRCP, but simultaneously denied Consumers' requests for discovery in order to respond to summary judgment styled arguments.[4] This was error both because as a procedural matter Consumers must be entitled to discovery to respond to factual (summary judgment arguments) and because the trial court made factual determinations[5] concerning whether there was an unconscionable bargaining process without any factual record.

Several factors bear on whether a party lacked a meaningful choice in assenting to a contract. These factors include the following: (1) disparity in bargaining power between the parties; (2) parties' relative sophistication; (3) whether the party seeking to avoid the contract is a "substantial business concern;" (4) whether there is an element of surprise in the offending provision's inclusion; and (5) conspicuousness of the offending provision. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Stated more broadly, this prong of the unconscionability analysis speaks to the fundamental fairness of the bargaining process. Id. at 669. In sum, this prong "depends

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[4] See R. p. 6, discussing language of purported arbitration agreements, outside the pleadings, and R. p. 16, denying Consumers any discovery.

[5] Because the trial court signed the proposed Order submitted by the attorneys for the Car Dealers, the Order entered by the Court contained numerous findings of fact by the Court even though no discovery was permitted. These findings of fact were erroneous.

upon all the facts and circumstances of a particular case." Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005). All five of these factors are factual determinations that cannot be made without discovery. For example, the trial court cannot possibly have properly considered whether "there [was] an element of surprise in the offending provision's inclusion" when there is no evidence on this point from either side to the purported agreement. Compelling arbitration without consideration of the Simpson factors was error.

Instead of allowing any arbitration-related discovery of the facts of the case, the trial court determined that discovery was unnecessary at this stage of the proceeding. Specifically, the Order states:

> Finally, plaintiffs' argument that discovery is necessary before determining whether the arbitration clauses are valid is unavailing. To allow these cases to proceed in discovery when the existence of enforceable arbitration clauses are clear from the face of the sales documents would completely defeat the purpose of the arbitration clause, which is to avoid litigation in state or federal court in order to resolve any pending individual disputes. Again, plaintiffs may raise these and other issues in arbitration, as each of the Arbitration Agreements provides for the arbitrator to determine issues related to the validity of specific provisions of the arbitration clause.

(R. p. 16). In refusing to allow arbitration-related discovery, the trial court held that the Consumers "may raise these and other issues in arbitration, as each of the Arbitration Agreements provides for the arbitrator to determine issues related to the validity of specific provisions of the arbitration clause." (Id.). The trial court then determined the purported arbitration agreements at issue were valid and enforceable. (R. pp. 13-16).

The trial court decides whether the parties have entered into a valid arbitration agreement. In Zabinski v. Bright Acres Associates, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001), the Supreme Court held that whether a valid arbitration agreement exists "is

an issue for judicial determination, unless the parties provide otherwise." In other words, in the absence of clear evidence to the contrary, "courts assume that the parties intended courts, not arbitrators, to decide . . . certain gateway matters, such as whether the parties have a valid arbitration agreement at all." Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 335, 588 S.E.2d 617, 621 (Ct. App. 2003)(quoting Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)).

This principle is true under South Carolina's Uniform Arbitration Act and contracts subject to the Federal Arbitration Act. See S.C. Code Ann. § 15-48-20(a)("if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue"). The South Carolina Supreme Court has already held that the validity of an arbitration agreement is not subject to arbitration. Simpson, 373 S.C. at 25, 344 S.E.2d at 669.

Arbitration rests on the agreement of the parties. The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties. The Housing Authority of City of Columbia v. Cornerstone Housing, LLC, 588 S.E.2d 617 (Ct. App. 2003); McMillan v. Gold Kist, Inc., 577 S.E.2d 482 (Ct. App. 2003). This requires development of arbitration-related facts because such rulings are based on the contractual nature of arbitration agreements. See Towles v. United Healthcare Corp., 524 S.E.2d 839, 843-44 (Ct.App.1999) ("Arbitration is available only when the parties involved contractually agreed to arbitrate.").

The trial court erred in refusing to allow arbitration-related discovery. This error was compounded by the fact that the trial court failed to apply ordinary state-law

principles that govern the formation of contracts in determining whether an agreement to arbitrate exists.

II. BECAUSE THE TERMS OF THE PURPORTED ARBITRATION AGREEMENTS REVEAL THE CONSUMERS AND THE CAR DEALERS HAD NO MEETING OF THE MINDS, THE TRIAL COURT ERRED IN UPHOLDING THE VALIDITY OF THE PURPORTED AGREEMENTS.

A. The Federal Arbitration Act ("FAA") Only Applies Where Parties Have a Valid and Enforceable Arbitration Agreement.

The trial court erroneously applied the Federal Arbitration Act ("FAA") and ignored the strong presumptions in favor of enforcing arbitration agreements by failing to first properly determine whether the parties had a valid and enforceable arbitration agreement. (R. pp. 9-10). Under the FAA's clear language, the FAA only applies in instances where a valid arbitration agreement has been established: "The court shall make an order directing the parties to proceed to arbitration" only "upon being satisfied that the making of the agreement . . . is not in issue." 9 U.S.C. § 4.

The FAA excepts from its scope circumstances in which the arbitration agreement is infirm "upon such grounds as exist at law or in equity for the revocation of any contract." Id. § 2. The Supreme Court of the United States recognizes that this "savings provision" - which encompasses "generally applicable contract defenses, such as fraud, duress, or unconscionability" - "may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]" Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 682 (1996). This recognition remains undisturbed by recent cases construing the FAA. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011)(citing Doctor's Assocs, Inc., 517 U.S. at 682); Id. at 1755 (Thomas, J., concurring) (agreeing that unconscionability remains a valid defense).

The South Carolina Supreme Court has determined that "the FAA does not require parties to arbitrate when they have not agreed to do so." Zabinski, 346 S.C. at 591, 553 S.E.2d at 116 (citing Volt Info. Scis. Inc. v. Board of Trs., 489 U.S. 468, 478 (1989)). Thus, arbitration rests on the agreement of the parties, and the initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties. The Housing Auth. of City of Columbia, 356 S.C. at 335, 588 S.E.2d at 621; McMillan v. Gold Kist, Inc., 353 S.C. 353, 359, 577 S.E.2d 482, 485 (Ct. App. 2003).

B. Appellant York's Purported Arbitration Agreement Lacks a "Meeting of the Minds" on Essential Terms.

1. South Carolina contract law is applicable.

It is axiomatic that arbitration agreements are but a particular species of contract and South Carolina contract law applies. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). "State law remains applicable [to arbitration agreements] if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally." Id.

2. The parties did not consent to arbitrate.

Under South Carolina law, for the court to compel arbitration without an opportunity for discovery, the arbitration agreement must be clear and unambiguous. "Where the terms of a [arbitration] contract are clear and unambiguous, the construction of the contract is a matter of law for the court, but where the terms of a contract are ambiguous, the intention of the parties becomes a question of fact to be determined by the jury." Traynham v. Yeargin Enterprises, Inc., 304 S.C. 188, 191, 403 S.E.2d 329, 330 (Ct. App. 1991). "Because the contract before us is ambiguous, we hold that the trial

judge properly overruled the motion to dismiss the complaint [to compel arbitration]." Id. at 190.

In the instant case, Appellant York's "Buyers Order" contains only two phrases that mention the word "arbitration." At the top of the pre-printed form, it states: "**THIS BUYER ORDER IS SUBJECT TO ARBITRATION PURSUANT TO SC CODE SECTION 15-48-10**," and at the bottom, it provides "purchaser agrees that any and all disputes . . . shall be subject to the Federal Arbitration Act." (R. p. 145) (emphasis added).

The phrase "subject to" merely means "obedient to" or "governed or affected by." Black's Law Dictionary, 1425 (6th ed.). There is no language in the Buyers Order or the purported arbitration agreement in which Appellant York agrees she is waiving the right to a jury trial or agreeing to arbitrate her disputes.[6]

Everyone is "subject to" the laws of South Carolina and the United States (including the Federal Arbitration Act). But agreeing that one is "subject to" the law is a far cry from waiving the right to a jury trial. At worst, the poorly worded contract presents a jury question as to whether by agreeing to be "subject to" the law or "subject to" arbitration, Appellant York intended a waiver of the right to a jury trial– it is certainly not "clear and unambiguous."

3. No meeting of the minds occurred between the parties.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." Player v. Chandler, 299 S.C.

[6] For example, there is no sentence stating that "Any and all disputes . . . shall be resolved by binding arbitration."

101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original). This requirement that a "meeting of the minds" must include all essential terms has been explicitly applied to arbitration contracts in South Carolina. See Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (explicitly citing Player and applying it to a purported arbitration agreement).

Appellant York's purported "arbitration agreement" has no provision as to what organization should govern the arbitration. There is no provision setting forth how an arbitrator shall be chosen. There is no provision explaining discovery rules, or setting forth how fees are handled. There is no provision explaining how an arbitration case may be initiated. The only terms in the purported agreement are a ban on arbitrations in a representative capacity and a statement that the arbitrator will decide issues of arbitrability. This is insufficient. The entire unconscionability analysis from Simpson and Herron as to whether there are "oppressive" or "one-sided" terms cannot be performed because there are no terms for the court to analyze.

C. Appellant Cristy's Purported Arbitration Agreement Lacks a "Meeting of the Minds" Because Two Separate Contracts Containing Purported Arbitration Agreements Have Inconsistent and Contradictory Terms.

Appellant Cristy was allegedly given two separate agreements that purport to compel arbitration. One such agreement is entitled "Contract of Sale" dated March 28, 2008. (R. pp. 151-152)

The second is a "Retail Installment Contract and Security Agreement" dated March 28, 2008. (R. pp. 274-278). Both agreements purport to be sales contracts – the "Retail Installment" contract states on its first line "**SALE**: You agree to purchase from us . . . ." (R. p. 275).

South Carolina law is clear that in the event of two contracts being executed at the same time on the same subject, they are treated as unitary. "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together." Harris v. Ideal Solutions, Inc., 385 S.C. 74, 79, 682 S.E.2d 523, 526 (Ct. App. 2009) (internal citation and quotation omitted).

As noted previously in this brief, "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). No such "meeting of the minds" could have occurred here because the terms are completely contradictory. The Retail Installment agreement (R. p. 278) requires all disputes be arbitrated, but the Sales Contract (R. p. 152) excludes "repossession, injunctive relief, or monies owed." The Sales Contract (R. p. 152) prohibits punitive damages, but the Retail Installment contract (R. p. 278) specifically permits them. The Retail Installment agreement provides the dealer will advance the fees, yet the Contract of Sale does not. (Id.)

The Contract of Sale has very specific provisions, one deposition, exhibits must be exchanged seven days before the arbitration, while the Retail Installment contract offers the choice of three different arbitral agencies, each with their own sets of rules. (Id.). A "meeting of the minds" between Appellant Cristy and Respondent Jim Hudson is improbable in light of these contradictory and inconsistent terms with regard to the key provisions of the purported agreement.

III. BECAUSE THE TERMS OF THE PURPORTED ARBITRATION AGREEMENTS ARE PLAINLY UNCONSCIONABLE, IN THAT THEY PRECLUDE STATUTORY RIGHTS AND OTHERWISE EVIDENCE A LACK OF A "MEANINGFUL CHOICE," THE TRIAL COURT ERRED IN REFUSING TO INVALIDATE THEM.

Application of the test set out in Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) reveals that the purported arbitration agreements are unconscionable and unenforceable. The trial court incorrectly applied the test.

A. Each of the Purported Arbitration Agreements, if Contracts at All, are Adhesion Contracts.

The Car Dealers' purported agreements are adhesion contracts. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it basis with terms that are not negotiable." Simpson, 373 S.C. at 26-27, 644 S.E.2d at 669. Adhesion contracts "are standard in the automobile industry." Id. at 27, 644 S.E.2d at 669.

The purported agreements appear as standard forms drafted by the Car Dealers. Each of the contracts containing the purported arbitration agreement have only blanks that can be filled in depending on the date of the transaction, the VIN number of the vehicle, the name of the customer, and the name of the dealership. There is no evidence in the record that either Consumer participated in the drafting of the alleged agreement or otherwise had a voice in formulating its terms.

There is no evidence in terms of the purported agreements that they were negotiable. Because purported "arbitration agreements" are adhesion contracts, if contracts at all, those agreements should be viewed with "considerable skepticism." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (adopting the rationale of Ohio Courts in analyzing arbitration agreements by automobile retailers and stating, "We . . . proceed to

analyze this contract between a consumer and automobile retailer with 'considerable skepticism.'").

As explained fully below, when viewed with a skeptical eye, the purported arbitration agreements are not enforceable under South Carolina law.

B. Each of the Purported Arbitration Agreements Contain One-Sided and Oppressive Terms.

In the words of our Supreme Court, "unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Herron v. Century BMW, 387 S.C. 525, 532, 693 S.E.2d 394, 398 (2010), cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts, 131 S. Ct. 2872 (U.S.S.C. 2011) and opinion reinstated, 719 S.E.2d 640 (2011).

There are two dispositive cases regarding the unconscionability of arbitration agreements in consumer automobile purchase agreements: Herron and Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). The court in Herron determined that the agreement before it was enforceable[7] while Simpson determined it was not. Here, the principal question is whether Appellant York's and Appellant Cristy's agreements resemble the agreement in Herron or the agreement in Simpson. As the

[7] Enforceable but for the provision banning class actions, a holding which was reversed by the U.S. Supreme Court but, on remand, was reinstated in a recent opinion by the South Carolina Supreme Court. Herron v. Century BMW, 387 S.C. 394, 719 S.E.2d 640, 645 (2011).

purported agreements in this case closely track the unconscionable agreements in Simpson, it was error for the trial court to enforce them.

As to the absence of meaningful choice, Herron explained that the agreement at issue was enforceable because the arbitration agreement was a "separate, one-page document" that was "clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font" rather than "buried in the sales contract" as in Simpson. See Herron, 387 S.C. at 533, 693 S.E.2d at 398. None of the three purported agreements in this matter are separate arbitration agreements, and certainly none are labeled as separate arbitration agreements at the top of the page; rather, they are a "Buyers [sic] Order" (York); a "Retail Installment Contract" (Cristy), and a "Contract of Sale" (Cristy). Thus, under Herron and Simpson, Cristy and York had no meaningful choice.

Appellant York's purported contract has only a couple of phrases, but does specify "any and all disputes . . . related to . . . service from dealer." The Simpson court specifically held that requiring arbitration of warranty service claims violated the Magnuson Moss Act, and refused to enforce it on that basis. "Therefore, the federal government has made it clear that parties may not agree to arbitrate an MMWA claim as the arbitration clause between Simpson and Addy attempted to do here. This Court will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Simpson, 373 S.C. at 33, 644 S.E.2d at 673 .

As to Appellant Cristy, her two agreements are replete with terms found to be oppressive and one-sided in Simpson and Herron. The language from the agreement in Simpson, which the court held to be one-sided and oppressive, states,

> Nothing in this contract shall require the Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer in connection with the purchase or lease of any vehicle and *any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration.*

Id. at 20, 633 S.E.2d at 666.

This language is repeated nearly verbatim in Plaintiff Cristy's "Contract of Sale." For example, the "Contract of Sale," at page 2, paragraph 11, states: "[N]othing in this Contract shall require Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Customer in connection with the purchase or lease of any vehicle, and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration." (R. p. 152). Thus, like the agreement in Simpson, Plaintiff Cristy's agreement is unenforceable because it is one-sided and oppressive.

Likewise, the Cristy "Retail Installment Contract and Security Agreement," on the back of pages 1 and 2, contains a one-sided, unsigned, "Notice of Arbitration Agreement," which provides: "You and we retain rights to self-help remedies . . . . These measures include, but are not limited to, setting off against a deposit-account, repossessing property, and foreclosing on property. You or we may obtain a temporary court order necessary to prevent harm until the arbitration is completed." (R. pp. 277-278). Although styled as mutual provisions, it is difficult to envision any circumstances in which the Consumers would benefit from these provisions. In fact, there are no circumstances in which the Car Dealers might be negatively impacted by these terms because the Consumers have nothing to repossess or foreclose. The Simpson Court held that this type of one-sided arbitration provision is unconscionable and unenforceable.

"To this effect, we can easily envision a scenario in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle . . . the provision is unconscionable and unenforceable." Simpson, 373 S.C. at 32, 644 S.E.2d at 672.

The trial court erred in enforcing these agreements because the agreements are one-sided and oppressive. As the Supreme Court of South Carolina has held, "we find that the provision in the arbitration clause dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies is one-sided and oppressive and does not promote a neutral and unbiased arbitral forum . . . the provision is unconscionable and unenforceable." Simpson, 644 S.E.2d 663, 672.

C. The Trial Court Enforced Arbitration Agreements that Violate this State's Public Policy to Protect the Car-Buying Public.

South Carolina courts will not enforce a contract whose terms are illegal or contrary to South Carolina public policy. Carolina Care Plan v. United HealthCare Serv., Inc., 361 S.C. 544, 556 606 S.E.2d 752, 758 (2004). In other words, a court will not "lend its assistance" to carry out the terms of a contract that violates public policy. Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010). A state's public policy can be "uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations of a people." Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689, 693 (1941). South Carolina public policy is "derived or derivable by clear implication from the established law of the state as found in its Constitution, statutes, and judicial decisions." Id.

The Consumers alleged that the Car Dealers are charging administrative fees in violation of statutory law, *inter alia*, S.C. Code § 37-2-307 (the "The Closing Fee Statute"). S.C. Code Ann. § 37-2-307 provides:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

The statute is tailored to protect car-buying consumers from unscrupulous car dealers and sets forth strict rules that Consumers allege the Car Dealers have not followed. The Consumers are South Carolina consumers who paid illegal administrative fees. The Consumers filed an Amended Complaint, which alleges the Car Dealers violated provisions of the Dealers Act, sought declaratory judgment as to the rights and legal relations under S.C. Code Ann. § 56-15-110 and/or S.C. Code Ann. § 37-2-307, and states a claim for unjust enrichment. (R. pp. 37-42, ¶ 30-51). The Consumers brought the action both individually and pursuant to section 56-15-110 for the benefit of all others who paid "administrative fees" to the Car Dealers. (R. p. 34, ¶ 3).

The Closing Fee Statute, S.C. Code Ann. § 37-2-307, authorizes motor vehicle dealers to register the amount of the fee with the Department of Consumer Affairs (hereinafter the "Department") and charge closing fees to consumers. The statute imposes three specific requirements on dealers charging closing fees:

1. the fee must be *disclosed* to the consumer on the sales contract or invoice;
2. the fee must be *displayed* in a conspicuous place at the dealership; and
3. the fee must be *included in* the advertised price of the motor vehicle.

The Closing Fee Statute does not further define the terms "closing fee" or "advertised price." Consumers alleged the Car Dealers did not avail themselves of the limited exceptions in S.C. Code Ann. § 37-2-307. (R. p. 38, ¶ 28).

In a similar case pending in Aiken County, the Honorable Doyet A. Early issued a declaratory judgment interpreting S.C. Code An. § 37-2-307. (R. p. 36, ¶ 13). Judge Early held:

> Defendant Taylor Toyota's proposed interpretation that the fee is not limited and can be charged for any purpose does not protect consumers. Under Defendant Taylor Toyota's interpretation, dealers can charge a fee, call it a "closing fee" (document fee, processing fee or some other name associated with documentation for an automobile closing), and then use the fee solely to make a profit. This interpretation would authorize the dealers to charge a fee with a potentially misleading name. This interpretation does not protect consumers. I find this interpretation unreasonable in light of the statute's purpose of protecting consumers.
>
> The more reasonable interpretation is that S.C. Code Ann. § 37-2-307 authorizes the charging of "closing fees" which are for the reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation. This interpretation protects consumers because it mandates that the charge is for the actual cost associated with a closing, which can be predetermined, and does not allow a dealer to name a fee a "closing fee" and then use the fee to make a hidden profit. ***
>
> The dealer may only charge the buyer closing fees that are actually incurred and are a necessity to the closing, thus reimbursing the dealer for actual closing fees incurred.

(R. p. 36 ay ¶ 13) (quoting Herron v. Dick Dyer, Inc. et al., CIA 06-CP-02-1230, Order of January 10, 2010).

The South Carolina General Assembly has expressly provided that the Consumers can bring this action on behalf of all persons who paid an administrative fee that did not comply with S.C. Code§ 37-2-307. S.C. Code Ann.§ 56-15-110 provides:

> (1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(C), any person who shall be injured in his business or property by

anything forbidden in this chapter may sue therefor in the court of common pleas and **shall recover double the actual damage by him sustained**, and the cost of suit, including a reasonable attorney's fee.

(2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, **one or more may sue for benefit of the whole**, including actions for injunctive relief.

S.C. Code Ann. §56-15-110 (emphasis added). The clear intent of the statute is to allow a group action for permanent injunctive relief (among other things) to protect all car-buying consumers, not just the named plaintiff, from the illegal actions of car dealers. Permanent injunctive relief is not necessary or effective if it applies only as to one plaintiff and one car dealer.

In Herron, the South Carolina Supreme Court held the purpose of the Dealers Act "is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act . . . ." Herron, 387 S.C. at 535, 693 S.E.2d at 399 In light of the Act's purpose to protect consumers, the South Carolina Supreme Court held:

> Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers **with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable.**

Id.

Additionally, the Court of Appeals has held that the Dealers Act was "[o]bviously enacted . . . because consumers' remedies at common law were deemed inadequate." Kucharski v. Rick Hendrick Chevrolet Ltd. P'ship, 2002-UP-584, 2002 WL 31386090 (S.C. Ct. App. Sept. 18, 2002).

As explained further below, under the clear precedent of Simpson and Herron, the agreements at issue here are unconscionable and unenforceable. Thus, the trial court erred in enforcing the purported agreements at issue in this appeal.

1. The purported arbitration clauses are invalid because they ban group or class actions.

The trial court incorrectly validated the arbitration clauses because those clauses preclude significant judicial remedies and rights. This case involves a substantive, statutory right, which states that when an "action is one of common or general interest to many persons . . . one or more may sue for benefit of the whole, including actions for injunctive relief." S.C. Code Ann. 56-15-110.8

Appellant York's "Buyer's Order" provides in pertinent part: "Buyer understands and agrees that this transaction involves interstate commerce and that **no action in a representative capacity** may be filed with the arbitrator and that **arbitrator has no authority to award any relief to anyone other than the above named purchaser or seller** . . . ." (R. p. 145) (emphasis added).

Appellant Cristy's "Contract of Sale" provides in pertinent part: "**In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party. Unless otherwise agreed in writing, no claims against Dealer shall be consolidated with other claims in the nature of a class action.**" (R. pp. 151-152) (underlined emphasis added). Appellant Cristy's "Retail Installment Contract and

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[8] This statutory right to a group action is not the same as a procedural class action under Rule 23, SCRCP. At least one trial court has recognized that the requirements of Rule 23 do not apply to cases brought as group actions under section 56-15-110. Herron v. Century BMW, C/A No.: 2006-CP-02-1230, Order of Motion to Dismiss and Substitute as to Toyota of Greenville, Inc., October 12, 2009, attached hereto as **Exhibit A**.

Security Agreement," signed on the same day as the above Contract of Sale, provides in pertinent part: "You and we also agree that any claim or dispute is to be heard and decided by one arbitrator only, only on an individual basis, and not as a class action." (R. pp. 278) (emphasis added).

The Supreme Court of South Carolina has held that the consumers have a "non-waivable right" to bring a representative action to benefit the whole under the Dealers Act, and any contract provision prohibiting such an action violates the Dealers Act and is void and unenforceable because it violates our State's public policy. Herron, 387 S.C. at 535, 693 S.E.2d at 399. Here, general state public policy is not against arbitration, but instead public policy is rooted in state statutory protection in favor of car buyers. The statutory protections in the Dealers Act would apply not only to an arbitration agreement, but also to any contract that attempted to eliminate the group action provisions of the state law.

The Dealers Act does not eliminate arbitration, but simply renders one clause in the purported arbitration agreements unenforceable. As the Supreme Court noted in its original Herron decision, the unenforceable provision could have been severed and the remaining terms enforced; however, the court further stated:

> [C]ounsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement. Century unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole.

Herron v. Century BMW, 387 S.C. at 536-37, 693 S.E.2d at 400. The fact that one contradictory provision can be rendered unenforceable does not indicate a public policy against arbitration. The enforceability of such a provision would be against public policy regardless of the type of contract. Therefore, the Supreme Court of the

United State's recent opinion in AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011) does not preclude a finding of unconscionability here.

Furthermore, an agreement to arbitration should not be enforced if a "party successfully challenges the formation of the agreement." AT&T Mobility, LLC, 131 S. Ct. at 1753 (J. Thomas concurring). Under South Carolina law, where a statute is enacted to protect the public, the statutory provisions become part of any contract, and they override any conflicting contractual provisions. See, e.g., Sloan Canst. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 119-20, 659 S.E.2d 158, 165 (2008)(recognizing that the underlying goals of the Procurement Code served important public interests and held that contracts formed pursuant to the Procurement Code were deemed to incorporate the applicable statutory provisions, with the statutory provision prevailing over conflicting contract provisions).

Because the Dealers Act was enacted for the benefit of car buying consumers, all contracts between a dealer and a car buyer incorporate the statutory rights, including the right to bring a group action for the benefit of the whole, set forth in the Dealers Act. As such, the Consumers' statutory right to a group suit under the Dealers Act became a part of the car purchase contracts from their inception. Because the arbitration agreement here attempted to eliminate the Consumers' statutory right, it was defective from the inception and thus, unenforceable.

In other words, the Consumers can bring a group action for the Car Dealers' alleged violations in charging administrative fees in violation of S.C. Code Ann.§ 37-2-

307.[9] The Dealers Act allows one aggrieved plaintiff to file an action on behalf of others so aggrieved.[10] Individual actions of "one plaintiff, one dealer," as Car Dealers would try to impose, would eviscerate the protections of the Dealers Act, which this Court has previously recognized is to safeguard the public: "[U]nconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest." Simpson, 373 S.C. at 30, 644 S.E.2d at 671 (emphasis added). The decision in Simpson was supported by earlier decisions, as that opinion noted:

> This Court has previously recognized the strong public policy notions behind the enactment of the SCUPTA and the Dealers Act. See deBondt v. Carlton Motorcars, Inc., 536 S.E.2d 399, 404 (Ct.App. 2000) ("It is a violation of the Dealers Act for any manufacturer or motor vehicle dealer 'to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.'" (citing S.C. Code Ann. § 56-15-40(1) (1991)); Young v. Century Lincoln-Mercury, Inc., 396 S.E.2d 105, 108 (Ct.App. 1989) (defining an unfair trade practice as a practice which is "offensive to public policy or which is immoral, unethical, or oppressive"), affd in part, rev'd in part, on other grounds, 422 S.E.2d 103 (1992) (per curiam). The Dealers Act also specifically provides that "any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C.Code Ann. § 56-15-130 (2006).

Id. at n 7. Likewise, the Supreme Court has determined that "[t]he purpose of the Dealers Act is consumer protection." Herron, 387 S.C. at 535, 693 S.E.2d at 399. Clearly, the Dealers Act was drafted to protect car-buying consumers and prevent car dealers from inflicting injury on the public.

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[9] S.C. Code Ann. § 37-2-307 is a consumer protection statute that allows a dealership to do what would otherwise be illegal-charge administrative fees-only if the dealership follows strict rules.

[10] The Dealers Act contains no specific class certification requirements, but none are needed. It is a substantive right, whereas class certification is a procedural mechanism.

The Dealers Act involves narrow restrictions not against arbitration for all consumer cases, but in favor of a specific protection for a certain type of litigant; in this case, car-buying consumers. This statutory protection is incorporated into all contracts with car dealers.

2. The purported arbitration clauses are invalid because they preclude statutory rights and remedies.

Another provision that was directly held to be unconscionable in Simpson is one prohibiting the arbitrator from awarding statutorily-authorized damages: "we find the provision prohibiting double and treble damages to be oppressive, one-sided . . . this provision is an unconscionable waiver of statutory rights, and therefore, unenforceable." Simpson, 373 S.C. at 30, 644 S.E.2d at 671.

Appellant Cristy's "Contract of Sale" provides in pertinent part: "In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party. **Unless otherwise agreed in writing, no claims against Dealer shall be consolidated with other claims in the nature of a class action.**" (R. p. 152) (underlined emphasis added).

This language prohibiting the arbitrator from awarding damages authorized under the Dealers Act makes the arbitration clause unconscionable. The arbitration clause goes beyond banning punitive damages, but instead specifically prohibits outright an arbitrator from awarding statutorily required treble or double damages. In Simpson, the Supreme Court held such an arbitration clause violates statutory law because it prevented the plaintiff from receiving the mandatory statutory remedies to which she may be entitled and that "permitting the weaker party to waive these statutory remedies pursuant to an

adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest." Id.

Therefore, under the clear precedent of Simpson and Herron, the agreements at issue here are unconscionable and unenforceable. These provisions cannot be severed because the purported agreements are "rife with unconscionable provisions and the intent of the parties is best achieved by removing the arbitration agreement[s] in [their] entirety." Simpson, 664 S.E. 2d 663 (quoting Booker v. Robert Half Intn'l Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005) (determining that severability is not always appropriate when terms are found to be unconscionable, particularly if, "judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.").

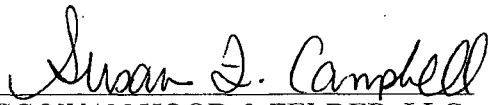
CONCLUSION

The trial court refused to allow discovery and thus, the trial court failed to consider the facts and circumstances of the Consumers' purchases from the Car Dealers and, in particular, their experience with signing written documents during the sales. The terms of the purported arbitration agreements at issue here reveal there was no meeting of the minds between the parties. Further, the terms of those purported agreements are plainly unconscionable and should not have been enforced. For all of these reasons, Appellants York and Cristy respectfully request this Court reverse the trial court's Order dismissing the case and granting the motions to compel arbitration.

[SIGNATURES ON NEXT PAGE]

December 27, 2012

Respectfully submitted,



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In The Court of Appeals

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Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Olga Joanne Cristy,

Appellants,

v.

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and Jim Hudson Automotive
Group, and Jim Hudson
Superstore, a/k/a Jim Hudson
Hyundai,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this **Appellants' Final Brief** complies with Rule 211 (b), SCACR.

December 27, 2012

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PROOF OF SERVICE

I, the undersigned paralegal, of the law offices of McGowan Hood & Felder, LLC, attorneys for Appellants Melissa Anne York and Olga Joanne Cristy, do hereby certify that I have served all counsel in this action with a copy of the **Appellants' Final Brief** by hand delivering a copy of same to counsel at the following addresses:

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